

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Sergio Antonio Haro,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
14

No. CV-23-00326-TUC-DCB

ORDER

15 Pending before this Court is Petitioner's "Motion to Vacate Sentence or Correct
16 Sentence," pursuant to 28 U.S.C. § 2255. (Petition (Doc. 1)). The Court denies the motion
17 and dismisses this action.

18 The Petitioner argues that his sentence is unconstitutional because counsel
19 representing him at resentencing was ineffective for the following reasons: 1) failure to
20 invoke the retroactive changes in law at his resentencing, which assumably¹ caused the
21 Court's failure to consider evidence of Petitioner's post-sentencing rehabilitation and in
22 this way ignored relevant 18 U.S.C. § 3553(a) factors; 2) failure to challenge the position
23 that the Court did not possess discretion to resentence Petitioner to 240 months or any
24 sentence other than 300 months under the First Step Act; 3) failure to seek relief under 18
25 U.S.C. § 3582(b) or the Equal Protection Clause for extraordinary and compelling reasons
26 due to his sentence being excessive and disproportionate, and 4) failure to seek entitlement
27 to a 2-level decrease for acceptance of responsibility.

28 ¹ Without this assumption, the allegation that the Court failed to consider post-sentencing
rehabilitation falls outside the context of his ineffective assistance of counsel claim.

1 A. Conviction and Sentence

2 Following a jury trial conviction for a continuing criminal enterprise offense and
 3 multiple drug charges, Petitioner received a life sentence based in large part on the
 4 recommended guideline range for the drug quantities involved in the offense, his leadership
 5 role in the offense, and involvement of a weapon. On direct appeal, the appellate court
 6 affirmed the conviction and sentence. Subsequently on habeas review, the sentence was
 7 reversed and the remanded for resentencing because the Double Jeopardy Clause prevented
 8 the defendant from being convicted for both the continuing criminal enterprise and the
 9 lesser included conspiracy counts. On remand, the Court dismissed Counts 3 and 11, the
 10 two drug conspiracy counts, and amended the sentence to 300 months for the continuing
 11 criminal enterprise count and entered concurrent sentences ranging from 300 months to 60
 12 months on other counts. The Court also imposed concurrent terms of supervised release
 13 and special assessments. This Petition challenges that resentencing.

14 In 2021, the Court imposed the 300-month sentence based on a presentence report
 15 updated to reflect sentencing changes made in 2014, Amendment 782, that reduced the
 16 base offense levels in the drug quantity table by two levels and dismissal of the drug
 17 conspiracy counts 3 and 11. Given the large quantity of drugs involved in the offense, the
 18 Amendment 782 changes did not change the guideline range, and it remained life in prison.
 19 The Court issued the substantially lower 300-month sentence based on a downward
 20 variance.

21 B. 28 U.S.C. § 2255: Motion to Vacate or Correct Sentence

22 Title 28 of the United States Code, Section 2255 provides for collateral review of
 23 Petitioner's sentence as follows:

24 A prisoner in custody under sentence of a court established by Act of
 25 Congress claiming the right to be released upon the ground that the sentence
 26 was imposed in violation of the Constitution or law of the United States, or
 27 that the court was without jurisdiction to impose such sentence, or that the
 28 sentence was in excess of the maximum authorized by law, or is otherwise
 subject to collateral attack, may move the court which imposed the sentence
 to vacate, set aside or correct the sentence. A motion for such relief may be
 made at any time.

28 U.S.C. § 2255. A district court shall summarily dismiss a § 2255 petition "[i]f it plainly

1 appears from the face of the motion and any annexed exhibits and the prior proceedings in
2 the case that the movant is not entitled to relief." Rule 4(b), Rules Governing § 2255
3 Actions. The district court need not hold an evidentiary hearing when the movant's
4 allegations, viewed against the record, either fail to state a claim for relief or are patently
5 frivolous. *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

6 C. Government's Response: 28 U.S.C. § 2255

7 For all the reasons explained in the Government's Objection, the Petitioner is not
8 entitled to habeas relief. The Petitioner fails to establish counsel representing him at the
9 resentencing was ineffective and fails to make any showing of prejudice.

10 The Sixth Amendment to the United States Constitution guarantees criminal
11 defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S.
12 666, 687-88 (1984). To establish ineffective assistance of counsel, Petitioner must show
13 the attorney's performance fell below an objective standard of reasonableness, which
14 prejudiced the Petitioner. *Id.* at 687. Prejudice can be shown if there is a reasonable
15 probability that, but for counsel's unprofessional errors, the result of the proceeding would
16 have been different. *Id.* at 694. The Court does not need to determine whether counsel's
17 performance was deficient before considering whether defendant suffered any prejudice.
18 *Id.* at 697. "It is easier to dispose of an ineffective assistance of counsel claim on the lack
19 of sufficient prejudice, . . . that course should be followed." *Id.*

20 The Court indulges a strong presumption that counsel's conduct falls within the
21 wide range of reasonable professional assistance, *id.* at 689, and must not second-guess
22 counsel's decisions nor apply the twenty-twenty vision of hindsight, *Campbell v. Wood*,
23 18 F.3d 662, 673 (9th Cir. 1994). A fair assessment of attorney performance requires that
24 every effort be made to eliminate the distorting effects of hindsight, to reconstruct the
25 circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's
26 perspective at this time. *Id.* (quoting *Strickland*, 466 U.S. at 689).

27 After a review of the record, the Court concludes Petitioner's counsel at
28 resentencing provided effective assistance of counsel. The sentencing memoranda raised

1 the issues raised in the Petition, *see* (Sentencing Memo (Doc. 1499), and counsel urged and
2 expanded on them at the resentencing. For example, Petitioner’s sentencing memoranda
3 and counsel at resentencing argued for a 2-level decrease for acceptance of responsibility.
4 Petitioner put his case to trial, and, therefore, his assertion of acceptance of responsibility
5 was based on a letter sent to the Court just prior to resentencing, acknowledging his
6 culpability. While questioning whether this “new” fact should be considered in the
7 guideline calculations at resentencing, the Court nevertheless found it insufficient as a
8 matter of fact to warrant a 2-level guideline reduction. *Id.* at 9. The “changes in the law”
9 referenced in the Petition were correctly explained by the Government as affecting lower
10 and middle level drug offenses, (TR (Doc. 1513) at 16-17). Given the large drug quantities
11 involved in the offense, Petitioner’s guideline range was not reduced. In short, both of these
12 assertions of error were raised and considered at resentencing, The Court found that there
13 were no changes to the guideline sentencing recommendation for life in prison. *Id.* at 8.

14 The Court understood that it had discretion to enter the requested 240-month
15 sentence. In fact, it asked the parties to address its discretion to reduce the 360-month term
16 imposed on other counts because replacing the life sentence with 240 months would
17 accomplish little if the 360-month term sentences remained. Petitioner’s attorney offered
18 case law to support her position that the Court’s discretion reached the entirety of the
19 sentences. The Government agreed but objected to such a low sentence reduction. *Id.* at 6-
20 8.

21 The Court considered the argument and evidence presented by the Petitioner of post-
22 sentencing rehabilitation, including his educational undertakings, his commitment to
23 physical fitness, not having tattoos or gang affiliations, his recent letter of acceptance of
24 responsibility, and the punitive nature of his 20-some year prison experience. The Court
25 was asked to, and did, compare his lack of maturity when he committed the offense at the
26 young age of 23 and his age, almost doubled, at the time of resentencing. Counsel pointed
27 out his mental health issues. *Id.* at 10-16. The Court did exactly what the Petitioner says it
28 didn’t do. The Court expressly said it considered the resentencing “as a sentencing of Mr.

1 Haro as if he's never been sentenced before. It's not a motion to reduce the sentence, that's
2 not the issue. It's what sentence would I give Mr. Haro today without consideration to what
3 I've given him in the past? That's how I'm looking at it.” *Id.* at 8. The Court considered all
4 the § 3553 sentencing factors, including some that had not changed—like the seriousness
5 of the of the offense.

6 The Court concluded, “today I see a different Mr. Haro. And so if I'm sentencing as
7 of today, I have to consider Mr. Haro today. And it seems like to me that his criminal spirit
8 has been squelched. I no longer think that when he gets out he'll do this again.” *Id.* at 17.

9 The Court pointed out it considered other factors, such a Petitioner’s problematic
10 behavior of obtaining a gun, taking a leadership role in the operations, and advancing his
11 own cocaine drug trafficking venture. *Id.* at 17-18. Then, the factors weighed in favor of
12 protecting the community by imposing a life sentence. At resentencing, the factors had
13 shifted in respect to the need for deterrence and weighed in favor of a variance. To be clear
14 the Court could have imposed a life sentence, but weighing the factors presented at
15 resentencing, the Court imposed a 300-month sentence “to reflect how serious the offense
16 was but at the same time giving Mr. Haro the hope that I think he now deserves that he will
17 see the outside again before the end of his life.” *Id.* at 18.

18 The Court was not then, nor is it now, persuaded that there is a great disparity
19 between Petitioner’s sentence and the sentences of other codefendants. The Court
20 considered the 292-month sentence it imposed on Petitioner’s father Julio, who committed
21 the instant offense while on release for a prior marijuana trafficking offense involving over
22 988 kilograms of marijuana. It sentenced Leonardo Burgos-Valencia, the alleged boss of
23 the marijuana trafficking offense, to 288 months. The Court sentenced Heriberto “Eddie”
24 Gonzalez, Jr., who Petitioner’s attorney argued was on the same level as Sergio, to 88
25 months in custody. The Court did not agree with counsel’s comparison. It sentenced
26 Petitioner to 300 months, which was not disproportionate to the sentences imposed for
27 codefendants, Julio Haro and Burgo-Valencia. *See* (TR at 18-19 (commenting that with
28 good time credits, he really doesn’t have much mor time to serve). For these reason, the

1 Court rejects the Petitioner's argument that his sentence is excessive and disproportionate
2 and should be reduced for a compelling and extraordinary reason under 18 U.S.C. §
3 3582(b) or the Equal Protection Clause.

4 The Court finds there was no prejudice to Petitioner due to ineffective assistance of
5 counsel. The Court imposed a sentence that was significantly less than a life sentence.

6 The Court agrees with the Government that the Petitioner cannot show prejudice.
7 "Under the sentencing analysis conducted by the Court at the 2021 resentencing, the
8 arguments of mitigation made in the § 2255 Petition were considered and, therefore, and
9 to the extent that they may be more articulately made here in the Petition, there is no
10 reasonable probability that the result of the proceeding would have been different."
11 (Response (Doc. 6) at 11-12.)

12 D. Conclusion

13 The Court rejects Petitioner's arguments of ineffective assistance of counsel at his 2021
14 sentencing and finds no prejudice to him from assistance of counsel at the time of
15 sentencing. The Court finds on the face of the motion and record of the prior proceedings
16 that the Petitioner is not entitled to relief, and therefore, there is no need for an evidentiary
17 hearing.

18 **Accordingly,**

19 IT IS ORDERED that Petitioner's "Motion to Vacate Sentence or Correct Sentence
20 Pursuant to 28 U.S.C. § 2255 (Doc. 1526) filed in CR 05-125-TUC-DCB and (Doc. 1) filed
21 in CV 23-326-TUC-DCB is DENIED.

22 **IT IS FURTHER ORDERED** that Civil case number CV 23-326-TUC-DCB is
23 DISMISSED with prejudice.

24 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
25 accordingly.

26 **IT IS FURTHER ORDERED,** pursuant to Rule 11(a) of the Rules Governing
27 Section 2255 cases, in the event Petitioner files an appeal, the Court declines to issue a
28 certificate of appealability because the Petitioner cannot demonstrate that "reasonable

1 jurists would find the district court's assessment of the constitutional claims debatable or
2 wrong." *United States v. Martin*, 226 F.3d 1042, 1046 (9th Cir. 2000) (citing *Slack v.*
3 *McDaniel*, 529 U.S. 473, 484 (2000).)

4 Dated this 4th day of April, 2024.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A handwritten signature in black ink, appearing to read "David C. Bury", is written over a horizontal line.

Honorable David C. Bury
United States District Judge